In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-869

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 150, JOINT COUNCIL OF TEAMSTERS No. 38, and GEORGE LA BRASCA,
Petitioners,

vs.

KENNETH W. SHERROD,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

Brief in Opposition

JOHN C. WEIDMAN, ESQ.
325 Main Street
Placerville, CA 95667
Tel.: (916) 622-5260

and

G. DANA HOBART, ESQ.
10880 Wilshire, 19th Floor
Los Angeles, CA 90024
Tel.: (213) 470-2638

Attorneys for Respondent

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

INDEX

AUTHORITIES CITED

CASES

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-869

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 150, JOINT COUNCIL OF TEAMSTERS No. 38, and GEORGE LA BRASCA,
Petitioners,
vs.
KENNETH W. SHERROD,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

Brief in Opposition

JURISDICTION

Petitioners' references to the opinions below and to the jurisdiction of this Court on a Petition for Certiorari are correctly set forth.

QUESTIONS PRESENTED

The "questions presented" as stated by Petitioners are incorrect and do not set forth the basis for the opinion of the Court of Appeal for the State of California nor properly reflect the record nor the State Court's application of

Farmer v. Carpenters Local 25, 430 U.S. 290 (1977) nor the applicability of IBEW v. Foust, ... U.S. ....., 60 L. Ed. 2d 698 (May 29, 1979).

The questions presented by this case are:

1. Whether the California District Court of Appeal has correctly interpreted and applied the decision of the United States Supreme Court in *Farmer v. Carpenters Local 25,* supra, in affirming the state court award of general and punitive damages on the instant case being submitted to the jury primarily for the tort of intentional infliction of emotional distress, not on the theories of Union interference with employment and expulsion from Union membership, and said award thereby is not subject to peremptory regulation of the National Labor Relations Act.

2. Whether the instant case was submitted to the jury primarily for the tort of intentional infliction of emotional distress, not on a separate legal theory for violation of the duty of fair representation of a union member, and thereby the decision of the United States Supreme Court in *IBEW v. Foust,* supra, did not preclude an award of punitive damages.

STATEMENT OF THE CASE

The Petitioners have incompletely stated the case in their Petition for Writ of Certiorari. Therefore, Respondent submits his statement of the case, as follows:

A. Background

Petitioner Chauffeurs, Teamsters & Helpers Local No. 150, hereinafter referred to as Union, had a membership of about 4,000 members in the mid-1960's. (R. 759)[1].

1. References to R. and number or numbers following are to the Reporter's Transcript of the proceedings at trial and the page or pages thereof.

The officers of the Union elected in December, 1963 were President Helmers, Vice-President Bonfiglio, Secretary-Treasurer Olsen, Recording Secretary Yaeger, three trustees, Ayers, Lomascola and Herrera, and nine Business Agents who included petitioner George M. La Brasca and Grady. These men were elected on the straight "progressive ticket" headed by Olsen, for a three-year term. (R. 39, 40; Pl. Ex. 2)[2]. The Secretary-Treasurer was the principal Executive Officer of the Union, and he supervised, conducted and controlled all of the business of the Local Union. (P. Ex. 45, p. 10).

Secretary-Treasurer Carl Olsen was the boss, the head man in those days. (R. 600). He ran the show. At Union meetings, he acted like a dictator. (R. 709, 710). The Union was Carl Olsen. (R. 760).

Union President Helmers was supposed to preside over meetings, but he would look to Olsen first, to see what he should do. (R. 837).

Petitioner Joint Council of Teamsters No. 38, a Joint Council of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as Joint Council No. 38, was governed by its Bylaws. (Def. Ex. D)[3].

Respondent Kenneth W. Sherrod has been a member of petitioner Union since July, 1959, except for an expulsion subject of this action. (R. 6). Respondent is a truck driver. (R. 6). He did Construction Teamster work on about half a dozen highways and dams prior to 1965. (R. 6). Respondent resided at Placerville, California, was married, adopted

2. References to Pl. Ex. and number are to an exhibit by number submitted by Respondent, Kenneth W. Sherrod, and admitted into evidence at trial.

3. References to Def. Ex. and number are to an exhibit by number submitted by Petitioners and admitted into evidence at trial.

a boy in the winter of 1965-66, and thereafter, he and his wife had two natural children. (R. 7, 9).

Respondent took an active part in Union meetings. Respondent frequently debated the policies of Olsen at regular meetings. (R. 1009-1011). He got up innumerable times in meetings to bring up legitimate topics and was told he was out of order and to sit down. (R. 749). He and Secretary-Treasurer Olsen were constantly on the opposite side. Respondent would question the expenses for approval by the Executive Board and Olsen would tell him to shut up and sit down or he was out of order. It was difficult for respondent to participate in Union meetings because Olsen threatened to throw him out if he didn't sit down. Respondent questioned the secrecy that went on in the Executive Board meetings. (R. 760-764).

Respondent ran for the office of Union Trustee in the December, 1963, elections as an independent opposing the "progressive ticket." He ran fourth, three to be elected. (R. 8-13; Pl. Ex. 3).

In 1964, Olsen and respondent were on unfriendly terms, by 1965 they were internal Union political enemies. (R. 14). They were in regular or constant disagreement. (R. 601).

Respondent told members in 1964 that he was going to run for Business Agent at the December, 1966, election. (R. 674). La Brasca stated that respondent would probably win. (R. 638, 639).

In 1965, respondent was driving an on-highway water truck for Kuckenberg Construction Company on a highway construction job at El Dorado Hills under a contract between the Union and Associated General Contractors. (R. 7). Petitioner Union operated a hiring hall for Construction Teamsters working under this agreement. (P. Ex. 33; Pl. Ex. 34; R. 9-11).

Respondent was dispatched from the Union hiring hall to the Kuckenberg job. (R. 18). There were no complaints by the employer or Business Agent about respondent's capability as a Teamster or the quality of his work for Kuckenberg. (R. 603, 631).

Respondent, prior to July 22, 1965, had complained to Kuckenberg about the safety of equipment he was driving and that someone not a Teamster was driving a truck supposed to be driven by a Teamster under the contract. (R. 21, 22, 24, 25, 301).

On Thursday, July 22, 1965, respondent received a written involuntary termination from Kuckenberg for "Reduction in force layoff". (R. 42). The slip was made up at 10:00 A.M., July 22, 1965. (R. 648-650).

On this date, there were three Teamster water trucks operated by Union Teamsters on the Kuckenberg job. All three were required for completion of the job. (R. 651-653).

It was the policy of the Union in 1965 when a Teamster was laid off for "reduction in force" to re-dispatch the Teamster to his old job if there was a request for a Teamster for the same job within thirty days after the "reduction in force" layoff. (R. 46, 607).

Kuckenberg called the hiring hall of the Union to dispatch another water truck driver for work the same day of respondent's termination, and on Monday, July 26, 1965, the new driver requested from the Union hiring hall drove respondent's truck until the end of the job. (R. 650-653).

Respondent filed a grievance Friday, July 23, 1965, to get his job back with pay for time lost. He also filed a second grievance about a month later for misassignments. (R. 335, 336).

A grievance procedure was set forth in the contract in the case of disputes between Kuckenberg and a Union member employee. This provided for the Union and Kuckenberg

to attempt to resolve the dispute, and upon failure thereof, to submit the dispute to a Board of Adjustment composed of two Employer representatives and two Union representatives. The procedure further provided that upon failure of the Board of Adjustment to resolve the dispute, arbitration could be requested by either party. (Pl. Ex. 33, pp. 17-19: Pl. Ex. 34, pp. 16-18).

The Union Business Agents, Grady and La Brasca, were unable to resolve respondent's grievance with Kuckenberg and the matter went to the Board of Adjustment. (R. 52).

On September 29, 1965, the Board of Adjustment deadlocked and the two Union Representatives, Smith and Overton, moved that the matter be submitted to arbitration. (R. 53, 54).

Olsen refused to submit the matter to arbitration, however. (Pl. Ex. 7).

Respondent did not know the cause for his termination until after September 29, 1965, and even filed a complaint with the State Labor Commission on the grounds that he was unlawfully discharged for refusing to operate unsafe and illegal equipment. A hearing was held by a Deputy Commissioner on or about August 17, 1965. Business Agents Grady and La Brasca were present at this hearing (R. 341, 367).

Respondent discovered after the above Board of Adjustment proceedings the following evidence involving La Brasca in his termination. (R. 49-51, 334, 604, 605).

1. About a week or ten days before respondent's involuntary termination, Saunders, a foreman on the Kuckenberg job, overheard petitioner La Brasca tell Kuckenberg job Superintendent Fackler, referring to respondent, "There is a bad apple out there so let's get rid of him. He wants my job. "We've got to figure out a way to get the man off the job." (R. 630, 634, 635, 368, 639).

2. The week following respondent's termination, Saunders saw La Brasca and Fackler, the Kuckenberg job superintendent, shaking hands and heard La Brasca say, "Good Riddance". (R. 654-657).

3. Teamster Waddell stated respondent La Brasca told him Sherrod was giving him fits out at Kuckenberg. (R. 969). Before respondent's termination, Grady and La Brasca asked Waddell if he was ready to go to work on Sherrod's job at Kuckenberg. Waddell overheard La Brasca state that respondent was going to be fired from Kuckenberg. (R. 607-699). Waddell was told by La Brasca a couple of days prior to respondent's reduction in force layoff to be prepared to go to work on respondent's job. (R. 724, 725).

4. Board of Adjustment member Overton advised respondent that Olsen told Grady to lose respondent's grievance case against Kuckenberg, that Olsen would not send the matter to arbitration, so respondent should take any settlement offer. (Def. Ex. W, pp. 70. 98; R. 367, 341).

5. Union hiring hall dispatcher Evans received a call on Thursday afternoon, July 22, 1965, from Kuckenberg, the day that respondent was terminated, to dispatch a Teamster water truck driver for work Monday. (R. 829, 830). La Brasca told Evans to send the next man out on the list (Bennett) and to forget about respondent and that he would take care of respondent. (R. 829, 830, 833). La Brasca admitted he knew Teamster Ward was driving respondent's truck the day after respondent's termination, and that the Teamster requested by Kuckenberg would be dispatched out to drive respondent's truck Monday. (R. 603, 605).

6. On Thursday afternoon, respondent called dispatcher Evans about his layoff. Dispatcher Evans had a conversa-

tion with La Brasca. La Brasca said he would go out there and take care of that "son of a bitch", referring to respondent. (R. 825).

7. Deputy State Labor Commissioner Ickes, who heard petitioners' labor commission complaint, had a conversation with Grady, who told him that it appeared one of the Business Agents was "mixed up in this mess". (R. 556; Pl. Ex. 51).

B. Internal Union Charges

On December 13, 1965, respondent cited Union Secretary-Treasurer Olsen before the Union Trial Board as a result of his failure to allow arbitration of respondent's case against Kuckenberg. (P. Ex. 8).

Union members can be charged with offenses specified in the International Constitution. (Pl. Ex. 45, p. 29). These include abuse of fellow members and officers by written or oral communications. Officers may be charged for failure to perform their duties. (Pl. Ex. 44, p. 108).

The Trial Board of Union generally consisted of the "progressive ticket" officers, except Business Agents, elected at the 1963 election. (Pl. Ex. 44, p. 100).

On December 13, 1965, respondent went to the International Union Vice-President George Mock in Sacramento, and in the presence of Olsen, respondent asked George Mock to investigate the circumstances of his termination of employment at Kuckenberg. He told Mr. Mock that he thought petitioner Business Agent La Brasca had an illegal connection in causing or assisting in the termination. Respondent told Mock and Olsen what he had been told by one person and said, "I would like you to find out if it's true." Mr. Mock never conducted an investigation. (R. 60, 65, 67).

No action was taken on trial of respondent's December 13, 1965, charge against Olsen, so respondent filed an unfair labor practice charge with the National Labor Relations Board on February 16, or 17, 1966, for the Union's failure to arbitrate the Kuckenberg case. (R. 150, 151, 167). The National Labor Relations Board refused jurisdiction.

Union Attorney Le Prohn, attorney for all petitioners through trial in this action, thereupon went down to the San Francisco National Labor Relations Board Office and got them to drop the charge on the grounds that the Union acted on his advice, and there was less than an even chance respondent would prevail in arbitration. (R. 918-920).

Attorney Le Prohn wrote the National Labor Relations Board and characterized respondent's hurts as more imagined than real. (R. 936, 937).

In taking respondent's deposition prior to trial in this action, Attorney Le Prohn referred to him as "buster" and told respondent to "shut up" and asked him to "give all the facts in your little head". (R. 936, 937).

On February 24, 1966, Secretary-Treasurer Olsen charged respondent with attacking him at a November, 1965, general meeting. (Pl. Ex. 41).

On February 24, 1966, La Brasca filed internal Union charges against respondent, citing respondent before the Trial Board for falsely accusing La Brasca of being instrumental, through collusion with Kuckenberg Construction Company, in severance of respondent's employment with said company. The specific instance cited the conversation of respondent with the International Vice-President Mock and Secretary-Treasurer Olsen on December 13, 1965. (Pl. Ex. 54). La Brasca did not voluntarily file the charge. He was told to file to protect himself from the National Labor Relations Board charge of respondent. (R. 618, 619). He

did not even prepare the charge, someone else dictated it for his signature. (R. 622).

On March 10, 1966, respondent filed internal Union charges against La Brasca, citing La Brasca before the Union Trial Board for causing his termination at Kuckenberg. (R. 76).

The International Constitution provides that if the charging party fails to appear in person or present evidence before any trial or appellate body on the date set for trial, the charges shall be dismissed and after such dismissal, the accused may not be re-tried on the same charges. (Pl. Ex. 44, p. 104).

Olsen set the Trial Board hearing of respondent's charge against Olsen for failure to arbitrate the Kuckenberg case on April 18, 1966. Respondent was unable to appear because he was preparing for a hearing the next day, and by telegram, requested postponement three days prior to the hearing. The Union Trial Board consisting of the "progressive ticket" denied continuance, heard the failure to arbitrate charge on April 18, 1966, and dismissed the charges and commended Olsen for not arbitrating (R. 70, 71).

The charges of La Brasca against respondent were set for hearing by Secretary-Treasurer Olsen of the Union for April 27, 1966, as were the charges of respondent against La Brasca. La Brasca was not present at said hearing on April 27, 1966. The chairman read a handwritten note from La Brasca asking for a continuance. La Brasca denied ever preparing or signing a written request for continuance. (R. 624). Respondent and Union member Brookins, who represented respondent, objected to a continuance, but the matter was continued and rescheduled for hearing on May 6, 1966. (R. 758-760).

Every member of Union shall be afforded equal protection and fair treatment in the application of the International Constitution and the Bylaws of Union. (Pl. Ex. 45, p. 28).

On April 27, 1966, respondent had witness Overton available for testimony. On May 6, 1966, respondent's witness Overton was not present. (R. 83).

The Trial Board hearing the charge against respondent was the same Trial Board that commended Olsen on respondent's charge at its April 18, 1966, hearing and contained substantially the "progressive ticket" of officers elected over respondent's opposition in December, 1963. Respondent in writing alleged bias and requested an impartial Trial Board. (R. 83).

Respondent asked for a continuance on May 6, 1966, to present statements from Overton, Saunders and Paul Smith by May 16, 1966. The Trial Board and respondent had no subpena powers. Respondent was not able to get these statements by the 16th of May and requested a further continuance through the 24th of May at 5:00 P.M. (R. 83, 84, 86; Pl. Ex. 15). Respondent was unable to get a written statement of Overton, but on May 24, 1966, at 3:55 P.M., delivered statements of Saunders and a telegram of Board of Adjustment member Smith to the Union office. (Pl. Ex. 21).

Respondent was notified in writing dated May 23, 1966, received on May 25, 1966, that the Union Trial Board unanimously found respondent guilty of the internal Union charge made by La Brasca and as punishment, expelled respondent from the Union. The Trial Board also unanimously found La Brasca not guilty of respondent's internal Union charge made against La Brasca. The Trial Board decision was dated May 18, 1966. (Pl. Ex. 35).

Respondent appealed his expulsion by the Union Trial Board to Joint Council No. 38. A new hearing was held on July 25, 1966, by Joint Council No. 38's Executive Board.

Olsen was a member of Joint Council No. 38 Executive Board, as were representatives of other Teamster Local Unions.

Bennie Juarez was the Secretary-Treasurer of Local No. 165 and appointed an Executive Board member to hear the appeal of respondent's expulsion by the Union Trial Board, replacing Olsen. (R. 467). Juarez never signed the decision of Joint Council No. 38 upholding respondent's expulsion. (Pl. Ex. 20). The evidence was never discussed by the Trial Board members after the hearing, and Juarez never voted on the decision. (R. 467-471).

Juarez never heard of a Teamster being expelled from a Union because he asked the Union to investigate the cause for being fired. (R. 487, 488). The exhibits before the Joint Council Executive Board were not passed down the table for review by members. The decision of Joint Council was made by its attorney Le Prohn. It upheld the internal Union charges of La Brasca and the expulsion of respondent. (Def. Ex. B).

Petitioner Union was the largest Local Union in the Joint Council. (R. 678).

Respondent appealed his expulsion to the International Union. The International took no action on its Hearing Panel recommendation. (Pl. Ex. 42). Respondent was restored to membership April 4, 1968, by Union. Olsen stated to Business Agents that he was going to reinstate respondent because respondent would win reinstatement if he went to court. (R. 810).

C. Severe Emotional Distress

Respondent had no Union rights during his expulsion. He was nominated for the office of Business Agent in 1966, but since he was not a Union member, he could not become

a candidate. (R. 191, 192; Pl. Ex. 45). He protested unsuccessfully the December, 1966, election. (Def. Exs. B and C; R. 194).

Respondent could not attend meetings during his expulsion since he was not a Union member. (Pl. Ex. 45).

Following his expulsion from the Union, there were many instances of notoriety brought to the attention of respondent. An Operating Engineer told respondent he heard he was kicked out of the Union. (R. 173). An acquaintance said it had been mentioned to him a hundred times. (R. 174).

The expulsion affected respondent's frame of mind. He did not think he could work under an Associated General Contractors contract. He did not think he could earn a living. He felt he could not convince prospective employers to let him work and that he would have to take non-Union jobs at $2.50 per hour against $5.00 per hour as a Union Teamster. (R. 174).

The expulsion had an effect on his family. He was humiliated when his wife went to the market with only quarters which was the largest denomination of money she had. (R. 175).

Respondent suffered anxiety and nervousness in that he worried about his credit, about staying current with his bills, about accumulating a surplus in the summer construction season to carry him through the winter. He had to live more on unemployment and on a part-time endeavor of cutting wood. (R. 176). He couldn't go to sleep as early as he formerly did. (R. 177).

Respondent testified there were numerous incidents that individuals were aware of his expulsion and that in excess of 100 people had communicated this to him. (R. 387, 388). A typical comment was, "I heard they stuck it to you." (R. 389).

Other Teamsters laughed when the subject was mentioned. Everybody he talked to seemed to have knowledge of the expulsion. (R. 397, 398).

Respondent's wife wanted to move from their home as a result of the expulsion. (R. 538). Respondent was worried about the long-term effects of having no Union Card. (R. 539).

It was more difficult for respondent to get unemployment insurance during the winter than if he had held a Union membership. As a non-Union member, he had to solicit three qualified employers each week to receive unemployment insurance. (R. 540, 541). Respondent felt the employers knew he was expelled and they didn't talk to him the same way they did when he was in the Union. It seemed as though they didn't want anything to do with him. (R. 542). Respondent felt shame and humiliation having to seek employment instead of having to be dispatched on the Union list. The interviewer at the Employment Office made sure that respondent knew it was not a normal circumstance being expelled from the Union. (R. 585-590). Respondent was worried about the uncertainties of the appeal to the Joint Council and International for restoration of his membership. (R. 594).

Respondent had to refinance his house during his expulsion. (R. 553, 554). Respondent had never had to do this before. (R. 596).

Respondent's expulsion was a general topic of conversation for quite a while. (R. 710, 748).

Olsen and La Brasca sought to alienate Respondent's former Union supporters by suggesting that they should become nice, quiet boys, because the same thing might happen to them that happened to respondent. (R. 773)

Union members who supported respondent were saying, "We know we have supported you all along, but we've got to give up on you, we've got to back off. They've got you. They threw you out of the Union and that's what's going to happen to us if we stand up. We have families to feed. We have children to feed, and we can't afford it." (R. 773).

Business Agent Grady advised Brookins who assisted respondent at his hearings, to forget about respondent, "Olsen is going to get him and you, too." (R. 764). After the hearings, Olsen would see Brookins and ask him, "How's your old buddy getting along?" (R. 777). He referred to Brookins as a Philadelphia lawyer. (R. 774). Brookins continued to be active in the Union until respondent was expelled. (R. 779). Membership at the meetings dwindled to 30 after respondent was expelled. (R. 779). If the matter of respondent's expulsion was brought up at the meetings, Olsen just told the members, "It's none of your business." He was running things, and that was the way it was. (R. 835).

Respondent secured a request letter to go to work at the Placerville Airport in June, 1966, after his expulsion. He was at first refused employment because Business Agent Henry told the employer respondent was not eligible for employment because he was not a Union member. (R. 205).

Respondent was refused employemnt by McKeown in February, 1966, because the employer was told by a Business Agent of Union that he could not hire respondent, and had better not hire respondent. (R. 133, 134).

D. Court Proceedings

Respondent filed his action in the Superior Court of the State of California, in and for the County of Sacramento, a Trial Court, on May 18, 1967.

Trial commenced on March 26, 1973, before a jury. (C. 71).[4]

The Court dismissed the action as to Olsen, as he was then deceased. The Court also dismissed the action as to Richard Henry and Howard Yaeger. (C. 90).

The Court granted respondent's motion to amend his complaint in accordance with proof, there being no opposition thereto. (C. 90).

Despite five causes of action pleaded, the case was submitted to the jury on the theory of intentional infliction upon respondent of severe emotional distress in accordance with his motion to amend his complaint to conform to proof, which was granted without opposition. The instructions to the jury on the theory of liability and damages were as follows:

> "In this action, the plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: 1. That the defendants or some of them intentionally by outrageous conduct inflicted upon plaintiff severe emotional distress. 2. That said conduct proximately caused injury and damage to plaintiff. 3. The nature and extent of said injury and damage and the amount thereof." (C. 106).
>
> "Before a plaintiff may recover for the infliction of severe emotional distress, the cause of it must proximately result from intentional outrageous conduct on the part of the defendants. Outrageous conduct is that behavior which is completely unreasonable and without justification in the handling of business or personal relationships." (C. 108).[1]

The jury was further instructed as to the measure of damages that could be awarded plaintiff, as follows:

4. References to C and number or numbers following are to Clerk's Transcript of the proceedings in the trial, Superior Court of the State of California.

> "If, under the court's instructions, you find that plaintiff is entitled to a verdict against defendant, you must then award plaintiff damages in an amount that will reasonably compensate him for each of the following elements of claimed loss or harm, provided that you find it was (or will be) suffered by him and proximately caused by the act or omission upon which you base your finding of liability. The amount of such award shall include:
>
> Reasonable compensation for any discomfort, fears, anxiety and other mental and emotional distress suffered by the plaintiff and of which his injury was a proximate cause (and for similar suffering reasonably certain to be experienced in the future from the same cause). (C. 132).
>
> No definite standard (or method of calculation) is prescribed by law by which to fix reasonable compensation for suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. (Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation.) In making an award for suffering you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence." (C. 133).

The jury was cautioned that they could not find liability or remedy or award damages for loss of income or wages from petitioners interfering with respondent's employment or employment opportunities, as follows:

> "You cannot award plaintiff damages for any claimed loss of income or wages resulting from the act of any defendant in interferring with plaintiff's employment or employment opportunities. The sole remedy for such conduct is under the National Labor Relations Act." (C. 135).

The jury awarded Kenneth W. Sherrod, respondent, $50,000.00 general damages and $125,000.00 punitive damages. The verdict runs against the three petitioners, Chauffeurs, Teamsters and Helpers Local 150, Joint Council of Teamsters No. 38 and George La Brasca. (C. 194).

The Judgment on Verdict was entered on April 16, 1973. (C. 195, 196).

Defendants' Motion for New Trial was denied June 14, 1973. (C. 228).

The Court of Appeal of the State of California, in and for the Third Appellate District, affirmed the judgment of the Trial Court on July 9, 1979.

Petitioners petitioned the Supreme Court of the State of California for a hearing. The Supreme Court of the State of California denied a hearing on September 6, 1979.

Petitioners petitioned the Honorable United States Supreme Court for Writ of Certiorari on December 5, 1979.

ARGUMENT

1. The California District Court of Appeal has correctly interpreted and applied the decision of the United States Supreme Court in *Farmer vs. Carpenters Local 25,* supra, by sustaining the state court award of general and punitive damages on the instant case being submitted to the jury primarily for the tort of intentional infliction of emotional distress, and said award is not subject to peremptory regulation of the National Labor Relations Act.

Farmer v. Carpenters Local 25, supra, sustained California State Court jurisdiction to award general and punitive damages to a Union member against his Union and business agent for intentional infliction of emotional distress as a result of "outrageous conduct" by the Union and its agent towards one of its members (Hill).

"Hill attempted to prove that the Union's campaign against him included 'frequent public ridicule,' 'incessant verbal abuse,' and refusals to refer him to jobs in accordance with the rules of the hiring hall." *Farmer v. Carpenters Local 25,* supra.

"No provision of the National Labor Relations Act protects the 'outrageous conduct' complained of by petitioner Hill in the second count of the complaint." *Farmer v. Carpenters Local 25,* supra.

"The State, on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained." *Farmer v. Carpenters Local 25,* supra.

"Recovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress. State Rubbish Collectors Assn. v. Sillznoff, 38 Cal 2d 330, 240 P2d 282 (1952); Alcorn v. Anbro Engineering, Inc., 2 Cal 3d 493, 468 P2d 216 (1970). The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities." *Farmer v. Carpenters Local 25,* supra.

"It may well be that the threat, or actuality, of employment discrimination will cause a union member considerable emotional distress and anxiety. But something more is required before concurrent state court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." *Farmer v. Carpenters Local 25,* supra.

California state tort of intentional infliction of severe emotional distress in the instant case arose primarily from the context of internal Union conflict between respondent

Union member and petitioners and Union leadership, which conflict resulted in Union interference with respondent's employment (Kuckenberg) and which conflict further resulted in the wrongful expulsion of respondent from Union membership, all to discourage respondent's active participation in Union affairs.

Initially the respondent's action was pled on wrongful expulsion and employment interference. However, the record discloses respondent's case was tried from the first day of trial on the cause of action of intentional infliction of severe emotional distress (C. 71-72). His complaint was amended to conform to proof without opposition of the petitioners during trial and before jury submission.

Thereafter, the case was submitted by instructions to the jury solely on the respondent's burden of proof that the petitioners (defendants) or some of them, intentionally by outrageous conduct inflicted upon respondent (plaintiff) severe emotional distress. (C. 106).

The jury was further instructed that the cause of the severe emotional distress must proximately result from the "outrageous" conduct of the petitioners (defendants). In the same instruction, the jury was instructed that the "outrageous" conduct was behavior completely unreasonable and without justification in the handling of business or personal relationships. (C. 108).

The jury was incidentally instructed as to what constituted the breach of the Union's duty of fair representation, that the law prohibits discrimination in the processing of a grievance based upon political considerations inside an organization, what constituted discrimination, hostility or bad faith, when the decision of a grievance was not binding on the Court, and that a Union expulsion Court case is limited to ascertaining whether the expelled member had a fair trial from the Union Trial Board. (C. 114, 125-127, 129).

These instructions were necessary as guidelines for the jury to judge whether petitioners' (defendants') conduct was "outrageous", that is, completely unreasonable and without justification in the handling of business or personal relationships between respondent and Union leadership.

However, the jury was instructed as to the elements of claimed loss suffered by respondent for which it could award damages. These elements did not include loss for breach of duty of fair representation, discrimination in processing a grievance, discrimination and hostility or bad faith or wrongful expulsion from the Union. The elements of claimed loss for which the jury was instructed it could award damages, included discomfort, fears, anxiety, and other mental and emotional distress. (C. 132, 133) These elements of damage are consistent with the primary theory upon which the instant case was tried and submitted to the jury, the intentional infliction of severe emotional distress.

Furthermore, the jury was instructed that the sole remedy for interference with employment or employment opportunities was under the National Labor Relations Act. (C. 135).

Specifically, the jury was instructed that it could not award damages for any claimed loss of income of wages resulting from interference with employment or employment opportunities. (C. 135). This instruction was given in sequence after the general damage instruction and was a cautionary instruction.

The jury was thus instructed that there could be no liability for the petitioners' interference with respondent's employment at Kuckenberg or the Placerville Airport, or his employment opportunities at McKeown.

Farmer v. Carpenters Local 25, supra, permits recovery by a Union member for a state tort which is unrelated to employment discrimination. The state tort in the instant

case was primarily unrelated to employment discrimination. It was primarily related to internal Union conflict. This internal Union conflict resulted in the outrageous conduct that was completely unreasonable and without justification by the petitioners and Secretary-Treasurer Olsen in causing interference with respondent's employment at Kuckenberg, respondent's wrongful expulsion from the Union, and the severe emotional distress inflicted upon respondent. The abusive and outrageous conduct towards respondent by petitioners and Olsen was based on the internal Union motive of petitioners and Olsen to punish or make an example of respondent for his lack of wisdom in opposing and continuing to oppose the "progressive ticket" Union leadership, and seeking election to La Brasca's Business Agent job. The outrageous, completely unreasonable and abusive conduct of petitioners and Olsen in the preparation of internal Union charges against respondent by petitioner La Brasca, the unfair trial procedures and trial of these charges by a Trial Board composed of the "progressive ticket" opposed by respondent, the unfair trial procedures and trial of these charges by Joint Council No. 38, and the abusive and completely unreasonable punishment, expulsion from the Union are the basis for respondent's cause of action against petitioners.

Farmer v. Carpenters Local 25, supra, also permits recovery for a state tort which is a function of the particularly abusive manner in which employment discrimination is accomplished or threatened.

If the state tort in the instant case is arguably related to employment discrimination, accomplished or threatened, it is a function of the particularly abusive manner in which any such discrimination was accomplished or threatened.

Any employment discrimination was a function of the particularly abusive manner in which the Union leadership

and Business Agent La Brasc accomplished their motive of making respondent an examp.e to other Union members who might contest Union leadership decisions, preventing respondent from having an opportunity to become an officer of the Union, preventing respondent from having an opportunity to question all of the decisions of the Union leadership, insuring that most members would not question any of the leadership decisions of the Union, and inflicting upon respondent outrageous punishment with devastating effects to his person.

Footnote 13., *Farmer v. Carpenters Local 25,* supra, Page 53, reads in part as follows:

> "Where evidence of discrimination is necessary to establish the context in which the state claim arose, the trial court should instruct the jury that the fact of employment discrimination (as distinguished from attendant tortious conduct under state law) should not enter into the determination of liability or damages."

The evidence of petitioners interfering with respondent's employment and employment opportunities was necessary to establish the context in which the state tort claim arose. The Trial Court properly instructed the jury as to the measure of damages for the state claim of intentional infliction of emotional distress, i.e., discomfort, fears, anxiety and other mental and emotional distress. (C. 132, 133).

The Trial Court further instructed the jury that the sole remedy for interfering with respondent's employment or employment opportunities was under the National Labor Relations Act. (C. 135).

The Trial Court further instructed the jury that it could not award damages for any claimed loss of income or wages resulting from interference with respondent's employment or employment opportunities. (C. 135).

The Court limited liability to intentional infliction of emotional distress and damages to discomfort, fears, anxiety and other mental and emotional distress. (C. 132).

The jury was properly instructed under *Farmer v. Carpenters Local 25,* supra, in the instant case, to permit award for the California state tort claim of intentional infliction of severe emotional distress.

2. The instant case was submitted to the jury primarily for the tort of intentional infliction of emotional distress, not on a separate theory for violation of the duty of fair representation of a union member, and the decision of the United States Supreme Court in *IBEW v. Foust,* supra, therefore did not preclude the award of punitive damages.

IBEW v. Foust, supra, holds that a State Court may not assess punitive damages against a Union and several of its officers for failure to timely process a grievance of a Union member. This was the sole issue in *IBEW v. Foust,* supra.

Despite the five causes of action pleaded, respondent's complaint was amended without opposition to conform to proof and the case was submitted to the jury primarily on an emotional distress theory. (C. 90, 71, 72, 106, 132).

Respondent was permitted by the instructions of the Trial Court only to recover for the intentional infliction of emotional distress. The jury was specifically instructed not to find a remedy or award damages for interference with employment.

Even if it be argued that employment discrimination or breach of duty of fair representation was necessary to establish the context in which the California State tort of intentional infliction of emotional distress arose, the Trial Court gave the cautionary instruction required by Footnote 13 in *Farmer v. Carpenters Local 25,* supra.

The case was not submitted to the jury on the separate legal theory for violation of the duty of fair representation.

If unfair representation was a necessary element to establish the state tort of intentional infliction of severe emotional distress, the jury was properly instructed as to what basis it could find liability and award damages.

The jury was specifically precluded from awarding any damages, either general or punitive, for employment interference. (C. 135). *IBEW v. Foust,* supra, does not apply to the instant case.

CONCLUSION

The California District Court of Appeal correctly interpreted and applied the decision of *Farmer v. Carpenters Local 25,* supra, in affirming the award of general and punitive damages for the California State tort of intentional infliction of emotional distress. The award was not subject to peremptory regulation of the National Labor Relations Act.

The instant case was submitted to the jury primarily for the tort of intentional infliction of emotional distress and not on a separate legal theory for violation of the duty of fair representation of a union member.

Therefore, the decision in *IBEW v. Foust,* supra, did not preclude an award of punitive damages.

Respondent respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN C. WEIDMAN and
G. DANA HOBART

JOHN C. WEIDMAN ESQ.
Attorneys for Respondent